

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

**NEIL GAIMAN, and
MARVELS AND MIRACLES, LLC,**

Plaintiffs,

v.

Case No.: 02-cv-00048-bbc

**TODD MCFARLANE, TODD
MCFARLANE PRODUCTIONS, INC., TMP
INTERNATIONAL, INC., MCFARLANE
WORLDWIDE, INC., and IMAGE
COMICS, INC.,**

Defendants.

**PLAINTIFF NEIL GAIMAN'S POST-HEARING BRIEF
IN SUPPORT OF HIS MOTION FOR AN ORDER DECLARING HIS
INTEREST IN DERIVATIVE CHARACTERS**

Pursuant to the Court's Order at the June 14, 2010 hearing in this action, plaintiff Neil Gaiman respectfully submits this post-hearing brief in support of his Motion For An Order Declaring Gaiman's Interest In Derivative Characters For Purposes Of Accounting Of Profits.

The evidence presented at the hearing confirmed what was shown in Gaiman's pre-hearing submissions: that the Tiffany and Domina characters are derivative of Gaiman's Angela character, and the Dark Ages Spawn character is derivative Gaiman's Medieval Spawn character. The visual and literary similarities between the characters are far too striking to be brushed off as coincidences or merely similar "ideas". Under the law, a character is derivative if it would be an infringement when used by an unauthorized party. (*See* Opening Br. [Dkt. 289] at 7-8.) There can be no question that if anyone else had created comics using Tiffany, Domina, or Dark Ages Spawn, the McFarlane Defendants would have sued them for infringement of their copyrights in the Angela and Medieval Spawn characters, and won. As a result, the Court should grant Gaiman's motion.

ARGUMENT

I. The McFarlane Defendants Focus On The Wrong Legal And Factual Issues.

The McFarlane Defendants’ attempt to catalog each minor difference between the characters fails to dispel their unmistakable similarity. Derivative characters are, by definition, different than the characters from which they are derived. The Copyright Act defines a derivative work as “a work *based upon* one or more preexisting works.” 17 U.S.C. § 101 (emphasis added). Indeed, derivative characters must be “significantly different” from the original work in order to receive independent copyright protection. See Gaiman v. McFarlane, 360 F.3d 644, 661 (7th Cir. 2004).

There is no specific test to determine whether one character is derivative of another. The general test for derivative works is the same as the test for infringement: a work is derivative if it is “substantially similar” to the original work. See 1 NIMMER ON COPYRIGHT § 3.01 at 3-3 (derivative works); JCW Investments, Inc. v. Novelty, Inc., 482 F.3d 910, 915 (7th Cir. 2007) (substantial similarity test for infringement). When comparing characters for purposes of infringement, courts examine things such as the character’s visual appearance, costume, “superpowers,” manner of speech, and personal story. See Warner Bros., Inc. v. American Broadcasting Cos., 720 F.2d 231, 241 (2d Cir. 1983) (“In determining whether a character in a second work infringes a cartoon character, courts have generally considered not only the visual resemblance but also the totality of the characters’ attributes and traits.”); see also cases cited in Gaiman’s opening brief [Dkt. 289] at 6.

At the hearing and in their briefs, the McFarlane Defendants suggested that the similarities between the characters at issue are limited merely to general “ideas.” But that argument grossly overstates the distinction between unprotectable “ideas” and protected “expression” for purposes of copyright law. Every feature of a character can be described as an

“idea” on some level. As the Second Circuit explained: “[W]e do not accept defendants’ mode of analysis whereby every skill the two characters share is dismissed as an idea rather than a protected form of expression. That approach risks elimination of any copyright protection for a character, unless the allegedly infringing character looks and behaves exactly like the original.” Warner Bros., 720 F.2d at 243.

The issue for the Court is whether the disputed characters, as expressed visually and verbally in the McFarlane Defendants’ comics and toys, are substantially similar to Gaiman’s Angela and Medieval Spawn characters as visually and verbally expressed. The facts show that they are.

II. Tiffany And Domina Are Substantially Similar To Both The Angela Character And The Other Angels Depicted In The Angela Comic Book Series.

At the hearing, the McFarlane Defendants suggested that the Angela, Tiffany, and Domina characters share merely the common “ideas” of scantily-clad, muscular women which, in their view, are common in comic books.¹ Those arguments do not hold up to even the most superficial analysis of the characters at issue. Yes, scantily-clad and muscular women have appeared in other comic books. But in this case, the Angela character and the other warrior angels depicted in the Angela comic books series (Exs. 17-19) are particularly unique expressions of such women. The Tiffany and Domina characters are almost direct knock-offs of those expressions and, as a result, they are derivative.

¹ In their response brief, the McFarlane Defendants cited Mattel, Inc. v. Azrak-Hamway Int’l, Inc., 724 F.2d 357 (2d Cir. 1983), to support their argument that the similarities between the three warrior angels are limited to unprotectable “ideas.” (Resp. Br. at 12-13.) In that case, however, the only features the characters shared was their generally muscular bodies and their crouching pose. See 724 F.2d at 360. All of the other features were different from the copyright owner’s characters and, unlike this case, the facts showed that the accused characters were intended to depict characters from an entirely different, pre-existing comic book series. See id. at 360.

A. Tiffany is derivative of Angela.



Angela
(Ex. 16)



Tiffany
(Ex. 16)

Above are images of Angela and Tiffany as they appear in the Spawn Bible. (Ex. 16.)

1. Tiffany and Angela share similar personalities and biographical traits.

Angela and Tiffany are both warrior angels. (See Ex. 16 at “Angela” and “Tiffany” pages.) Both characters are hunters of Hellspawn. (Angela: see Ex. 1 at 1-9; Tiffany: see Ex. 16.) They are both depicted as especially aggressive hunters. (Angela: see Ex. 4 at 15 (“all the subtlety of a Sherman tank”); Tiffany: see Ex. 16 (“She has been ruthless in her quest to rid the Earth of [Hellspawn]”); Ex. 8 at 3 (“I just have to take out this Spawn quickly and without mercy”).) Both are depicted as rebellious angels who challenge authority and do not always follow Heaven’s rules. (Angela: see Ex. 1 at 15-16 (confrontation with supervising angel, Gabrielle); Exs. 17, 18, 19 (Angela mini-series in which Angela is arrested for violating Heaven’s law and goes on the lamb); Ex. 13 at 12 (described as “the renegade”); Tiffany: see Ex. 8 at 2 (“This will be non-sanctioned . . . that’s all the sanction I need”); Ex. 9 at 6 (described as a “rogue angel”).)

The text of the Spawn comics also emphasizes the similarity between Tiffany and Angela. The Spawn Bible describes Tiffany as “second only to Angela” “as a hunter of Hellspawn” and speculates that Tiffany would win a knock down drag out fight with Angela. (Ex. 16 at “Tiffany”.) In Spawn Issue 44, Tiffany is described as being “[l]ike Angela, wanting a trophy for your showcase.” (Ex. 8 at 17.) In that same issue, Tiffany explains that she “shattered all of Angela’s old records” and wants to “take Angela’s place as priority A-1 [angel].” (Id. at 3.)

2. Tiffany and Angela have similar “superpowers”.

Tiffany and Angela both possess superhuman strength. (See generally Ex. 1 (Angela), Ex. 8 (Tiffany).) They both use unique “superweapons”: in the case of Angela, a giant lance/spear (see Ex. 1 at cover); in the case of Tiffany, a unique sword and gun. (See Ex. 8 at 15, Ex. 9 at 2.) Both of them have the ability to travel between Heaven (Elysium) and Earth. (Angela: see Ex. 1 at 15, Ex. 16 at “Angela,” Ex. 17 at 12-22; Tiffany: Ex. 8 at 2, 14-15.)

3. Tiffany and Angela are virtually identical in costume and appearance.

Finally, as discussed in Gaiman’s opening brief (Dkt. 289 at 12-14) Tiffany is virtually identical to Angela in costume and appearance. (Compare images of Angela in Exs. 1, 17-19 with images of Tiffany in Exs. 8, 9, 35 at 8.) In its May 24, 2010 Order, the Court noted the numerous similarities between the costumes and physical appearances of Tiffany and Angela. (Dkt. 302 at 6.) None of the evidence presented at the hearing did anything to suggest that Tiffany is something other than a derivative of Gaiman’s Angela character.

B. Domina is derivative of the Angela character and/or the angels appearing in Gaiman's Angela comic mini-series.

The Domina character is less developed in the Spawn comics than Tiffany, but is no less derivative. Domina plays a small but important role in Spawn Issues 97-99. (See Exs. 11-13.) In addition, the McFarlane Defendants sold at least two Domina toy action figures. (See Ex. 34 at 2-3.)

Domina's personality is substantially similar to Angela's. Like Angela, Domina challenges authority and does not follow the rules of Heaven. In Spawn Issue 97, Domina commits "heresy" by defying a command from the Elysium "throne". (Ex. 11 at 16.) In Spawn Issue 98, Domina confronts other angels and tells them "do not stand in our way." (Ex. 12 at 8.)

Domina's superpowers are substantially similar to Angela's. Like Angela, Domina possesses superhuman strength; the McFarlane Defendants' website describes her as leading angels into battle against the "superpowered Hell demon Urizen." (Ex. 34 at 1.) Like Angela, Domina has the ability to travel between Elysium and Earth. (Ex. 12 at 17; Ex. 13 at 11.)

With regard to costume and visual appearance, the depictions of Domina are more varied than Tiffany, but all are still derivative of either Angela or other angels in Gaiman's Angela mini-series. As shown in the images below, the Domina action figure toy is nearly identical to the depictions of Angela in Spawn Issue 9. (See also Ex. 34 at 3 (second Domina action figure).)



Angela
Spawn Issue 9
(Ex. 1)



Domina
action figure
(Ex. 34 at 2)

Domina's costume and appearance in the action figures are essentially identical to Angela's in the following respects: muscular, voluptuous physique, wild hair, metal winged headdress, black eye mask,² metal shoulder pad, giant lance/sword, wide weapons belt; thong bikini; fabric draped between her legs; metal bra; and garter on her thigh.

(Compare Ex. 1 at cover page and 6 with Ex. 34 at 2 and 3.)

In the three Spawn comics in which she appears (issues 97-99), Domina is depicted somewhat differently. In Spawn Issue 98, she is depicted with straight black hair, wearing an elaborate headdress, a costume of draped fabric, and no weapons. (See Ex. 12 at 8.) In Spawn Issue 99, she is depicted as wearing a metallic battle costume. (See Ex. 13 at 11-12.) While those specific depictions differ from Angela, they are taken directly from the depiction of other angels appearing in Gaiman's Angela mini-series. (See Ex. 18 at 10 (angel with straight black

² At the hearing, the McFarlane Defendants suggested that Angela's black eye mask was derived from Spawn's white eye mask. That is irrelevant. Angela's eye mask is indisputably both different from Spawn's and unique to Angela. Thus, it is relevant to the determination of whether Tiffany and Domina

hair, elaborate headdress, costume of draped fabric, and no weapon), Ex. 17 at 10 (angel in metallic battle costume).

Thus, no matter which version of Domina one examines, she is derivative of Gaiman's work. Either she is derivative of Angela, as is plainly the case with the Domina action figures, or she is derivative of other angels appearing in the Angela mini-series. Thus, the Domina character is a derivative work and is subject to Gaiman's accounting of profits.

III. Dark Ages Spawn Is Substantially Similar To Medieval Spawn.

A. Brian Holguin's belief that he did not copy Medieval Spawn is irrelevant because Holguin read Spawn Issue 9 and had access to all of the prior works containing Medieval Spawn.

The only truly new evidence that the McFarlane Defendants presented regarding the Dark Ages Spawn character was the testimony of Brian Holguin, the writer for certain issues of the Spawn The Dark Ages series. Mr. Holguin testified that he did not believe that he based the Dark Ages Spawn character on Gaiman's Medieval Spawn character. Holguin may honestly believe that, but it is irrelevant, because the law only requires Gaiman to show that Holguin had access to the Medieval Spawn character before creating his work. See JCW Investments, Inc., 482 F.3d at 915 ("copying may be inferred where the defendant had access to the copyrighted work").

For example, in Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976), the musician George Harrison was accused of copying The Chiffons' song "He's So Fine," for his own song "My Sweet Lord". The court found that Harrison had committed copyright infringement, despite believing Harrison's claim that he did not knowingly copy the song. The court wrote:

are derivative of Angela. See Gaiman, 360 F.3d at 661-62 (later character could still infringe Medieval Spawn, even though Medieval Spawn is derivative of Spawn).

Did Harrison deliberately use the music of He's So Fine? I do not believe he did so deliberately. Nevertheless, it is clear that My Sweet Lord is the very same song as He's So Fine with different words, and Harrison had access to He's So Fine. This is, under the law, infringement of copyright, and is no less so even though subconsciously accomplished.

Id. at 180-81.

Here, there is no dispute that Holguin had access to the Medieval Spawn character before he began writing Spawn The Dark Ages. Holguin testified that he had worked for the McFarlane Defendants on many occasions (Tr. at 1-P-29-30) and written more than 80 issues of Spawn (Tr. at 1-P-21), had read approximately thirty other issues of the Spawn comics (Tr. at 1-P-24), and had access to the entire body of Spawn comics. (See Tr. at 1-P-22, ln. 1-10; Tr. at 1-P-27.) In fact, Holguin specifically testified that he had read Spawn Issue 9 (the Gaiman-written comic in which Medieval Spawn first appears) in connection with his work for McFarlane. (Tr. at 1-P-12; 1-P-23.)

Moreover, even if intent to copy were relevant to the derivative character analysis, there are facts in the record suggesting that McFarlane deliberately transformed Medieval Spawn into Dark Ages Spawn because he knew Gaiman was likely to sue him over his use of the Medieval Spawn character. The first issue of Spawn The Dark Ages was published in March 1999. (See Ex. 22, copyright notice on inside cover page.) In that issue and subsequent issues, Dark Ages Spawn is also called the "Black Knight". (See, e.g., Ex. 22 at 6, 21; Ex. 23 at 1.) Eight months earlier, in July 1998, the McFarlane Defendants published an issue of Curse of the Spawn in which they promoted an upcoming action figure toy called "The Black Knight" who lived in the "Dark Ages" and would have "an emphasis on this medieval time." (Ex. 21 at 28, "Endcap".)

Those statements in July 1998 suggest that McFarlane's plans for the Spawn The Dark Ages comic were already in the works at that time. Then, on February 14, 1999 – the eve of publication of the first issue of Spawn The Dark Ages – Gaiman received a letter from

McFarlane stating that McFarlane was “rescinding” their previous agreements and “all rights to Medieval Spawn and Cogliostro shall continue to be owned by Todd McFarlane Productions.”

Gaiman, 360 F.3d at 652.

In light of that suspicious timing, it is entirely plausible that McFarlane planted the seeds for the copying of the Medieval Spawn character when he gave Holguin the description of the new comic series he wanted Holguin to write,³ even though Holguin may have had no idea he would be copying the Medieval Spawn character.⁴

B. Dark Ages Spawn is substantially similar to Medieval Spawn.

Regardless, the evidence at the hearing confirmed that the Dark Ages Spawn character is substantially similar to Medieval Spawn.⁵ In deciding the McFarlane Defendants’ earlier appeal in this case, the Seventh Circuit stated exactly what features make Medieval Spawn unique and subject to copyright protection: “his costume and manner of speech, together with the medieval background.” Gaiman, 360 F.3d at 662. In other words, the Court said, “A Spawn who talks medieval and has a knight’s costume would infringe Medieval Spawn.” Id. The evidence presented at the hearing confirms that Dark Ages Spawn meets that test.

C. Dark Ages Spawn has the same medieval background as Medieval Spawn.

The terms “medieval” and “dark ages” are synonymous; both refer to the Middle Ages. See Merriam Webster’s Collegiate Dictionary (10th ed.) at 293, 722. The McFarlane Defendants made that clear in Exhibit 28, which is a comic they created to promote a Medieval Spawn toy.

³ McFarlane could not remember what directions he gave to Holguin. (Tr. at 1-P-65.)

⁴ It is worth noting that the McFarlane Defendants did not call Liam Sharp, the artist for the series and purported co-creator of Dark Ages Spawn, as a witness (see Tr. 1-P-6), so we have no way of knowing what Sharp used as the basis for his illustrations of Dark Ages Spawn.

⁵ The McFarlane Defendants may contend that Dark Ages Spawn cannot be derivative because Mr. Gaiman did not recognize certain portrayals of the character as being copies of Medieval Spawn. The test for copyright infringement, however, views the works through the eyes of the “ordinary reasonable person.” JCW Investments, 482 F.3d at 916. Mr. Gaiman is not an ordinary observer because he knows precisely what he created and can more readily tell when something is not his work.

The inside front cover states, “Todd Toys presents: ‘Dark Ages’ Medieval Spawn,” and “Medieval Spawn created by: Todd McFarlane & Neil Gaiman”. (Ex. 28, inside front cover.)

The McFarlane Defendants confirmed the equivalence of “medieval” and “dark ages” in Curse of the Spawn, where they promoted their new “Black Knight” toy with statements such as “The Dark Ages Come to Light” and “an emphasis on this medieval time.” (Ex. 21 at 28 “endcap”.)

The Dark Ages Spawn character does not just live in the same general era as Medieval Spawn, he lives in the exact same century, the 12th Century. (Medieval Spawn: see Ex. 16 at “Medieval Spawn”); Ex. 1 at 9 (“800 Years Later”); Ex. 3 at 1 (“Another Spawn fought nearly 800 years ago.”); Ex. 28 at 1 (“800 years ago.”); Dark Ages Spawn: see Ex. 32 (“A 12th Century knight”); Ex. 38 (“12th Century”).

In addition, the “rules” of the Spawn universe, as described in those comics, dictate that no two Hellspawn can be on Earth at the same time (Tr. at 38-39; Tr. at 1-P-9, ln. 9-10), and that only one Hellspawn is created every 400 years. (Tr. at 38; Tr. at 1-P-72-73, Tr. 1-P-77.) Those rules would lead a Spawn reader to believe that Medieval Spawn and Dark Ages Spawn were intended to be two versions of the same character.

D. Dark Ages Spawn’s personal story is strikingly similar to that of Medieval Spawn.

Like Medieval Spawn, Dark Ages Spawn is a knight. (Medieval Spawn: see Ex. 1 at 2; Ex. 16 at “Medieval Spawn”; Dark Ages Spawn: see Ex. B to Dkt. 290.) Like Medieval Spawn, Dark Ages Spawn committed bad deeds in the past. (Medieval Spawn: see Ex. 1 at 5 (“I was a man...a bad man.”); Dark Ages Spawn: see Ex. 23 at 5 (“A good man, but a guilty one, as well. There were sins for which he sought absolution.”).) Both use their powers to help the defenseless. (Medieval Spawn: see Ex. 1 at 1-2 (helps apparently defenseless maiden); Dark Ages Spawn: see Ex. 45 at 10 (protects woman being attacked by brigands); Ex. 24 at 20 (leads villagers in revolt against repressive Baron).) The Dark Ages Spawn character even has a sister

who marries his enemy – just like Medieval Spawn. (Medieval Spawn: see Ex. 1 at 3 (“when I returned, my sister was indeed married... not to the man I would have chosen.”); Ex. 25 at 17 (“Eloise. My wife... Your sister” (ellipses original).)

E. Dark Ages Spawn “talks medieval”.

In general, the Dark Ages Spawn character has relatively few lines of dialogue in the Spawn The Dark Ages comic series. But when he does speak, in the words of Judge Posner, Dark Ages Spawn “talks medieval.” Gaiman, 360 F.3d at 662. Below is a sampling of his lines from each of the issues of Spawn The Dark Ages that were introduced at the hearing.⁶

- Issue 2: “My Lord, my Lord... Why have you forsaken me?” (ellipses original) (Ex. 23 at 10.)
- Issue 3: “I have seen the blood of innocents spilt while an idle God stood by and did nothing.” (Ex. 24 at 20.)
- Issue 4: “Aye. Go fetch him.” (Ex. 25 at 16.)
- Issue 7: “You’re nothing more than a vain little prig.” (Ex. 46 at 7.)
- Issue 8: “You say this angel . . . is out to slay me? Very well then, I say.” (Ex. 47 at 1.)
- Issue 15: “It is I, Covenant. Do not fear me. Come.” (Ex. 26 at 10.)

At the hearing, the McFarlane Defendants attempted to describe the character’s stilted speech as merely “hero speak,” rather than an attempt to portray the character as “talking medieval”. That argument is not credible given that all of the other characters in the Spawn The Dark Ages series speak in the same stilted manner. (See e.g., Ex. 22 at 1.)

F. Dark Ages Spawn’s costume has the same features the Seventh Circuit found make Medieval Spawn sufficiently distinct to receive copyright protection.

At the hearing, the McFarlane Defendants suggested that the features of Dark Ages Spawn’s costume and accessories that identify him as living in medieval times – his armor, his

weapons, and his horse – are merely “stock” or generic attributes of that time period which, they implied, makes it impossible for Dark Ages Spawn to be derivative of Medieval Spawn. But that position conflicts with the law of this case. In the McFarlane Defendants’ appeal, the Seventh Circuit expressly addressed the issue of whether the Medieval Spawn and Cogliostro characters were merely “stock character” and rejected that proposition. See Gaiman, 360 F.2d at 659-660. Indeed, it was Medieval Spawn’s supposedly “stock” costume that, in part, helped make him sufficiently distinct to receive separate copyright protection. See id. at 661.

The costume and accessories of Dark Ages Spawn are substantially similar to those of Medieval Spawn. Both characters ride horses. (Medieval Spawn: see Ex. 1 at 2; Dark Ages Spawn: see Ex. 22 at 20, Ex. 24 at 22.) Both wear an armor helmet and faceplate with rivets. (Medieval Spawn: see Ex. 1 at 2, 4; Dark Ages Spawn: see Ex. 22 at cover; Ex. 23 at cover; Ex. 24 at cover.) Both characters have armor shoulder pads with spikes.⁷ (Medieval Spawn: see Ex. 1 at 2; Dark Ages Spawn: see Ex. 22 at cover; Ex. 23 at cover; Ex. 24 at 13.) Both carry an oversized sword. (Medieval Spawn: see Ex. 2 at 4; Dark Ages Spawn: see Ex. 22 at cover; Ex. 23 at 17.) And both carry an old-fashioned battle shield. (Medieval Spawn: see Ex. 1 at 2, 3; Dark Ages Spawn: see Ex. 15 at cover.)

The McFarlane Defendants will likely point out that the depictions of Dark Ages Spawn vary between issues. Regardless, there can be no question where each of those iterations of Dark Ages Spawn were derived from: they all came from Medieval Spawn. The fact that Gaiman’s

⁶ Dark Ages Spawn has no lines of dialogue in the first issue of Spawn The Dark Ages.

⁷ At the hearing, Mr. McFarlane suggested, in response to a leading question, that the pre-existing Spawn character had spikes on his shoulders. (Tr. 1-P-40.) That is not true. The image they displayed at the hearing contained spikes, but not on the Spawn character’s shoulders. (See Ex. 37.) There are no images of Spawn in the record (or, to our knowledge, outside the record) that depict Spawn with spikes on his shoulders. In other testimony, Mr. McFarlane failed to identify shoulder spikes as a feature contained in the original Spawn. (Tr. at 1-P-44.) Shoulder spikes are a unique feature of Medieval Spawn and show up for the first time in Gaiman’s Spawn Issue 9. (See Ex. 1.) In that issue, the Spawn character has no spikes on his shoulders, but Medieval Spawn does. (See id.)

Medieval Spawn character is the basis from which all later versions of Medieval Spawn and Dark Ages Spawn evolved can be seen in the images below.



Medieval Spawn
Spawn Issue 9
(Ex. 1 at 2)



Medieval Spawn
action figure
(Ex. 31 at 1)



Medieval Spawn
action Figure
(Ex. 31 at 6)



Dark Ages Spawn
Spawn The Dark Ages Issue 1
(Ex. 22 cover page)

Finally, the McFarlane Defendants contend that Dark Ages Spawn is actually derivative of the original Spawn character, rather than Medieval Spawn. That is an effort at

misdirection. There is no dispute that Dark Ages Spawn, like Medieval Spawn, shares some characteristics of the original Spawn character. Indeed, Medieval Spawn is derivative of Spawn. See Gaiman, 360 F.3d at 661. But Medieval Spawn – and the medieval features that entitle him to separate copyright protection – preceded Dark Ages Spawn. Thus, because Dark Ages Spawn is substantially similar to Medieval Spawn in precisely those medieval features, Dark Ages Spawn is derivative of Medieval Spawn, rather than Spawn. The Seventh Circuit’s earlier decision in this case puts that issue to rest. See id., 360 F.3d at 661-62.

CONCLUSION

For all of the reasons stated above, plaintiff Neil Gaiman respectfully requests that the Court grant his motion for an order: 1) declaring that the characters Tiffany, Domina, and Dark Ages Spawn (Lord Covenant) are derivative of the characters jointly owned by Gaiman and are, therefore, subject to Gaiman’s accounting of profits in this action; and 2) directing the McFarlane Defendants to produce all documents relating to Tiffany, Domina, and Dark Ages Spawn for purposes of the accounting.

Dated this 25th day of June, 2010.

s/Jeffrey A. Simmons

Allen A. Arntsen, WI Bar No. 1015038

Jeffrey A. Simmons, WI Bar No. 1031984

Of Counsel:

Kenneth F. Levin

Kenneth F. Levin & Associates, Chtd.

3100 Dundee Rd., Ste. 307

Northbrook, Illinois 60062-2459

Tel: (312) 827-9000

KenFLevin@gmail.com

FOLEY & LARDNER LLP

150 East Gilman Street

Madison, WI 53703-2808

Tel: (608) 257-5035

Fax: (608) 258-4258

aarntsen@foley.com

jsimmons@foley.com

Attorneys for Plaintiffs